Note: Executive Order 12834 has been revoked.

OFFICE OF GOVERNMENT ETHICS

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Letter to a Designated Agency Ethics Official dated February 24, 1998

Your letter of January 21, 1998, requested our advice concerning whether [an employee's] restrictions under the post-employment provisions of 18 U.S.C. § 207(c) on seeking official action as a former senior employee may be limited to [a component of a] Department, rather than the entire Department, by reason of agency component designations allowed in 18 U.S.C. § 207(h). If so, she would also enjoy the effect of that limitation with respect to the post-employment restrictions of President Clinton's senior appointee pledge. For the reasons discussed below, our opinion is that the component designations under section 207(h) do not apply to [the employee], and therefore her senior employee and senior appointee restrictions on post-employment activity will extend to all of [the Department] as her former agency.

We understand that after serving for 24 years as a career civil servant at [the Department], [the employee] was appointed in 1994 to the position of Assistant Secretary of the [component], for which Executive Schedule level IV pay is fixed according to 5 U.S.C. § 5315. Under 5 U.S.C. § 3392, however, she elected to continue her pay and related personnel rights as if she remained at level 5 of the Senior Executive Service (SES), based on her previous career service. She now plans to leave the Government.

As a former senior employee under 18 U.S.C. § 207(c), [the employee] will be barred for one year from making certain appearances and communications before employees of her former department or agency. Section 207(h) allows the Office of Government Ethics (OGE) to ameliorate that bar by designating separate agency components for purposes of section 207(c), and we have designated the [component] as a separate component of [the Department]. See Appendix B to 5 C.F.R. part 2641. By the terms of 18 U.S.C. § 207(h)(2), however, that designation does not apply for senior employees whose status derives from section 207(c)(2)(A)(i), as discussed below. The issue, therefore, is whether [the employee's] senior employee status derives from section 207(c)(2)(A)(i) or from other language in the statute.

The resolution of this issue will also determine the extent of [the employee's] former agency for purposes of the additional post-employment restrictions in Executive Order 12834 of January 20,

1993. That Executive order requires certain senior appointees, including [the employee], to contractually commit to a pledge, one of the terms of which is that they will be barred for five years from lobbying employees of their former agency after leaving employment as a senior appointee. By the terms of that pledge, senior appointees also agree to the Executive order's definitions, one of which is that the term "agency" includes the senior appointee's entire agency, except where agency component designations under 18 U.S.C. § 207(h) apply. [The employee] says that at the time she signed her senior appointee pledge, the meaning of "agency" was not explained to her, but that she assumed her former agency would logically be the [component], not [the Department].

Under the facts presented, [the employee's] senior employee status for purposes of 18 U.S.C. § 207(c) must derive from either section 207(c)(2)(A)(i) or (ii) (referenced below as "clause (i)" and "clause (ii)"). Clause (i) defines senior employees as persons who are "employed at a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5 [5 U.S.C. § 5311 et seq.]," while clause (ii) covers those who are "employed in a position which is not referred to in clause (i) and for which the basic rate of pay . . . is equal to or greater than the rate of basic pay payable for level 5 of the Senior Executive Service."

Your letter suggests that clause (i) should not apply, because [the employee] is not employed at a rate of pay specified in or fixed according to 5 U.S.C. § 5311 et seq., by reason of her having opted instead to receive pay at level 5 of the SES. As you acknowledge, however, OGE's regulation implementing 18 U.S.C. § 207(c) defines at 5 C.F.R. § 2641.101 the term "senior employee" as described in clause (i) of the statutory provision as one who is "employed in a position [emphasis added] for which the rate of pay is specified in or fixed according to 5 U.S.C. §§ 5311-5318 (the Executive Schedule)." The regulation also uses identical language at 5 C.F.R. § 2641.201(e)(2)(i) to specify those senior employees described in clause (i) of the statutory provision who are not eligible to benefit from separate agency component designations under section 207(h).

The regulation at 5 C.F.R. part 2641 was issued by OGE after consultation with the Department of Justice. We believe that the phrase "employed in a position" captures the intended meaning of the statute. This regulatory terminology permits consistency in interpreting several related but disparately worded phrases in 18 U.S.C. § 207(c) and (d). Furthermore, our interpretation is ineluctably compelled by a reading of clauses (i) and (ii) in conjunction, as clause (ii) describes persons "employed in a position [emphasis added] which is not referred to in clause (i)."

Applying this controlling regulatory language, we are of the opinion that [the employee] is a senior employee by reason of 18 U.S.C. § 207(c)(2)(A)(i), because she is employed in a position for which the rate of pay is fixed according to the Executive Schedule, despite her election to continue receiving pay as if she remained at level 5 of the SES. Therefore, her former department or agency under both 18 U.S.C. § 207(c) and Executive Order 12834 is all of [the Department], as the separate agency component designation for the [component] under section 207(h) does not apply to her.

Your letter concludes by suggesting that [the employee] is entitled to some type of equitable or other relief from the five-year lobbying restriction of the senior appointee pledge because, given her lengthy background as a career civil servant with [the Department], this restriction will especially limit her future employment activities. Based on our interpretation herein of 18 U.S.C. § 207(c)(2)(A)(i), however, any relief would have to come through changes to the statute or Executive order, or otherwise from the White House itself.

Sincerely,

Stephen D. Potts
Director